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Glen T. Seal and Zelma T. Seal v. Mapleton City : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

GLENN T. SEAL and ZELMA T. SEAL, Plaintiffs and Appellants, v. MAPLETON CITY CORPORATION, a Municipal Corporation, by and through its Mayor and Board of City Councilmen, Defendant and Respondent.	Case No. 15948

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth Judicial District Court of Utah County, Honorable David Sam, District Judge.

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NATURE OF THE CASE

This is an action by the plaintiffs and appellants for a Writ of Mandamus to compel the respondent to approve plans for the development of a subdivision or, in the alternative, for alleged damages for the taking of property by eminent domain, without just compensation.

DISPOSITION IN THE LOWER COURT

The trial court, at the conclusion of the plaintiffs' case, denied the appellants' request for a Writ of Mandamus, dismissed the appellants' claim for alleged damages, for lack of evidence, and granted respondent's Motion to Dismiss the Complaint, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests that this Court affirm

the judgment of the trial court.

STATEMENT OF FACTS

At all times material hereto, appellants, Glenn T. Seal and Zelma T. Seal, were husband and wife, and were the owners of a certain tract of land, consisting of approximately 19.5 acres, located within the corporate limits of respondent, Mapleton City Corporation, hereinafter sometimes referred to as the "City". (Exhibits 12, 13, 20, 24)

Being desirous of developing the aforesaid land into a subdivision, appellants first submitted to the Planning Commission of Mapleton City a request for the re-zoning thereof from zoning classification A-2 (agricultural zone) to zoning classification RA-2 (residential agricultural zone), which request was approved by the Planning Commission and forwarded to the City Council on or about November 13, 1974. (Exhibits 20 and 12; TR., pp. 60, 62, 138) The Council discussed the request in its meeting on November 19, 1974, and scheduled a public hearing on the matter for December 17, 1974. (Exhibit 44) At the public hearing on the scheduled date, it was noted by members of the Planning Commision that a plan should also be submitted within sixty to ninety days recommending certain changes in provisions of the Master Plan as they related to subject property. It was also noted that twelve other adjoining property owners had indicated a desire and intention to submit similar requests for zone changes with respect to their properties. (Exhibit 44)

At the City Council meeting which immediately followed the public hearing, it was moved that the Council approve the request

for zone change, but the motion died for want of a second, and the matter was deferred until the next Council meeting when it was anticipated that two absent Council members would be present. (Exhibit 44) At the next Council meeting, on January 7, 1975, the motion was renewed and, one Councilman still being absent, the vote taken was two in favor of the zone change and two against, whereupon the Mayor broke the tie by voting for the change and the motion carried. (Exhibit 24, 44; TR., pp. 63, 165)

Under Section 7-6-2 (2) of the Mapleton City Code, the Residential Agricultural Zone (RA-2) permits Planned Dwelling Units, but only when approved by the City Council after receiving the recommendations of the Planning Commission. At the next meeting of the City Council, therefore, on January 21, 1975, it was observed that the appellant might be proceeding with expensive engineering and planning for the subdividing of his acreage and Councilman Korth was directed to consult with Mr. Seal and assure his understanding that the re-zoning of his property in no way committed the City to the approval of his subdivision plans. At the same time, the City Engineer explained that the existing water lines supplying that part of the City might be inadequate to meet the requirements of the subdivision and a computer study was authorized to determine the impact of extensive building in the area on the water system. (Exhibits 8 and 44)

At some point in time, contemporaneous with the foregoing events, and at a closed "Executive" Session of the City Planning Commission, of which Mr. Seal was an Alternate Member, a decision was reached to recommend to the City Council that certain roads

be deleted from the City Master Plan in order to accommodate the appellants' proposed subdivision. This decision was not formally entered in the official minutes of the Planning Commission until July 9, 1975, having previously been forwarded to the City Council. (Exhibits 19, 22, 44; TR., pp. 116-117, 188-189, 235)

The Master Street Plan of Mapleton City, adopted in 1958, (Exhibit 18) contemplated concentrated growth in the center of town, with gradual and orderly extensions outward. (TR., pp. 156, 204-205) Consistent therewith, a proposal of the Planning Commission to re-zone the entire Northwest sector of the City for residential purposes was rejected by the Council. (TR., pp. 157, 158, 208) Similarly, a proposed subdivision applied for by one "Carnesecca", prior to the Seal application, and consisting of 240 homes located in close proximity to the Seal subdivision, had previously been turned down by the Council. (TR., pp. 181, 208) This City policy was affirmed by the Planning Commission at a Planning Commission meeting held on February 12, 1975, where, on a prevailing vote of three to two, the Commission expressed its consensus as favoring the continuance of development along existing streets, rather than planned development elsewhere. (Exhibit 35, 44; TR., pp. 215, 216)

On April 9, 1975, a Preliminary Plat for appellants' proposed subdivison was presented to the City Planning Commission by one Denny Murray, Mr. Seal's representative, who was also himself an Alternate Member of the Planning Commission. (Exhibits 13, 31, and 32; TR., pp. 251 and 252) A motion to approve the preliminary plat and recommend the same for approval to the City Council carried, but upon the express condition that the water

problem be resolved. (Exhibit 32; TR., pp. 66, 67, 100, 192-193, 231, 253)

At a meeting of the City Council held May 20, 1975, the appellants requested that the Council review the preliminary plat for the purpose of obtaining a "general feeling from the Council", so they could determine whether or not to proceed with the Final Plat. (Exhibit 26; TR., pp. 194, 195, 265, 266) The plan called for the development of forty-four (44)homes on lots ranging from one-third acre to one-half acre, plus, and would conflict and interfere with the proposed 1400 North and 700-800 West Streets designated on the Master Street Plan. (TR., pp. 194, 195, 265, 266)

It was noted at the meeting that a public hearing would be required before any streets could be deleted from the Master Plan. (TR., pp. 265, 266) In general terms, the appellants proposed to limit construction in the proposed subdivision to five homes per year for the first three years, with no restrictions thereafter and to offer a lot in the subdivision to the City for a recreational area. In the same meeting, the Council also discussed a proposed Interim Development Zone and took the Seal subdivision matter under advisement. (Exhibit 26; TR., pp. 184-185)

On June 3, 1975, the appellants appeared before the City Council to discuss the use of an irrigation well owned by them on other property, as a possible means of resolving the water distribution problem. The appellants indicated that they would retain title to the well, but if they should ever decide to sell it, the City would be given the first right of refusal to purchase

the same. (Exhibit 27; TR., pp. 292, 294, 373) The Council indicated that the water problem was one of distribution rather than supply, because smaller water lines leading from the City's water sources empty into larger pipes within the City and the flow of water in the larger pipes is limited to the quantity which the smaller pipes can convey. (TR., pp. 24, 33, 34, 72)

On July 1, 1975, a public hearing was held to consider the recommendation of the City Planning Commission that the Council delete from the Master Plan those streets conflicting with or affected by the proposed subdivision. At the subsequent meeting of the City Council, immediately following, a motion was made to delete such streets from the Master Plan, but was defeated by a vote of three to two, whereupon, the Mayor appointed a Special Committee to discuss the matter further with the appellants and to determine the effect of the Interim Development Zone, if adopted, on future development. (Exhibit 36) In general terms, Mr. Seal proposed to the Special Committee certain actions designed to meet the City's objections to the subdivision, including, among others, a first option to purchase the appellants' irrigation well, if the appellants should ever determine to sell the same; the conveyance to the City, for recreational purposes, of a single lot in the subdivision, with the express condition that the lot could not be traded or sold for the purpose of acquiring a larger tract for recreational purposes in any other area; and an escrow arrangement to insure the installation of off-site improvements by depositing the sum of $700.00 as and when each lot were sold in the proposed subdivision, for the construction of a hard

surface road, curb, gutter, and sidewalk as each home was constructed, all of which proposals fell short of satisfying the requirements of the ordinance and meeting the objections of the Council. (Exhibits 36 and 23; TR., pp. 292, 293, 294, 329)

After another month of study and consideration, the City Council met again on August 5, 1975, after a public hearing relating to the establishment of an Interim Development Zone, at which time a motion was made to approve the Preliminary Plat of the appellants' proposed subdivision. The motion was defeated by a majority vote of three to two. (Exhibit 29, 44; TR., pp. 269, 332-333) Among the plethora of reasons for refusing to approve the appellants' preliminary plat, are the following, as set forth in a letter from the City to the appellants dated October 6, 1977. (Exhbit 43):

1. In the judgment of the City, the approval of the proposed subdivision would result in the impairment of City Services to the other inhabitants of the City and necessitate the imposition of an impossible tax burden on all City residents, in order to provide necessary municipal services.

2. The proposed subdivision, as represented by the Preliminary Plat, conflicts with the Master Street Plan of the City, and a proposal to delete the affected streets from the Master Plan was rejected.

3. No "Final" Plat of the proposed subdivision was ever submitted to the City prior to the commencement of the appellants' action, as required by provisions of the Mapleton City Code and the time for submitting such "Final" Plat, after approval by the

Planning Commission of the Preliminary Plat and all extensions granted in connection therewith, had long expired.

4. The City's water distribution and delivery system is not adequate to accommodate the requirements of the proposed subdivision without substantially impairing the ability of the City to fulfill the service requirements of present water-using inhabitants of the City and without imposing upon the City and its taxpayers an inordinate financial burden beyond the capacity of the City to meet. (Exhibit 8, 44) The proposals of the appellants for use of their irrigation water well for culinary purposes was carefully analyzed.

5. The proposed subdivision did not comply with the Utah County Health Department regulations regarding soil percolation tests for septic tanks. The Utah State Board of Health had already refused to approve the installation of septic tanks in the proposed "Carnesecca" subdivision which showed a more favorable drainage classification than land embraced in the Seal proposed subdivision. (Exhibit 33; TR., pp. 117, 118, 120, 181, 208, 209, 210)

On June 21, 1977, more than two years after the "conditional" approval of the appellants' Preliminary Plat by the City Planning Commission, and long after the pending action had been commenced, the appellants belatedly submitted to the City Council a purported "Final" plat of the subdivision, which was never filed with the Planning Commission, as required by ordinance. (Exhibit 38; TR., pp. 196, 198, 203, 204, 245, 255, 258; Mapleton City Code, 1971, Sections 9-6-3, 9-6-4, 9-6-5)

No appeal was ever taken by the appellants to the Board of Adjustment of Mapleton City from any action taken or decision made by the City Council as provided by Ordinance. (Mapleton City Code, 1971, Section 7-4-3)

Under this state of facts, Judge Sorensen, while presiding over the case, ruled at pre-trial, that the appellants had not exhausted their "administrative remedies" (Court file Minute Entry December 17, 1976). Following that ruling, the appellants asked for a change of judge and Judge Sam, to whom the case was assigned, out of an abundance of consideration for the appellants, set the case for trial and heard the same for approximately five days and until the appellants rested their case.

The appellants, at no time filed any verified claim for damages allegedly sustained by them as a result of any acts or omissions of the respondent, either before or after the filing of their Complaint in this action, and offered no evidence whatever at the trial of any damage sustained. (Affidavit of City Recorder attached to respondent's motion for Summary Judgment; TR., pp. 426)

ARGUMENT

POINT I

THE APPELLANTS HAVE NOT FOLLOWED THE PROCEDURES SPECIFIED OR COMPLIED WITH THE REQUIREMENTS OF THE MAPLETON CITY CODE RELATING TO SUBDIVISIONS AND HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES.

Contrary to the position taken by the appellants at trial, the inclusion of a particular tract of land in a particular "zone" does not, automatically, entitle the property owner to approval

of any subdivisional plans he may submit or to the issuance of blanket building permits. Section 7-6-2 (2) of the Mapleton City Code permits "planned dwelling units" in Residential Agricultural Zone RA-2, but only when approved by the City Council after receiving the recommendations of the Planning Commission. The appellants' responsibilities, therefore, did not end when the zoning classification of their property was changed from Agricultural zone A-2 to Residential Agricultural zone RA-2 on January 7, 1975. (Exhibit 24) The procedures and requirements for securing approval of subdivisional plans are spelled out clearly in Sections 9-6-1 through 9-6-16 of the Mapleton City Code, 1971. The record before this Court demonstrates graphically that there was barely more than a semblance of compliance by the appellants with the requirements of the Ordinance. First of all, the appellants and the subdivision which they proposed clearly fall within the definition of subdividers and subdivisions set out in Section 9-6-1 of the Mapleton City Code. Second, Section 9-6-2 of the Code provides that no person shall subdivide any tract of land nor sell, offer for sale, or exchange any parcel of land which is part of a subdivision unless there shall first be recorded a plat of such land which has been prepared and recorded in compliance with the requirements of the ordinance. Section 9-6-4 of the Code requires the subdivider to file a "Preliminary Plat" and provides that the Planning Commission or the City Council may approve or reject such plat or grant approval on conditions stated. This Section further provides that approval of the Preliminary Plat by the Planning Commission

or City Council shall not constitute "final" acceptance of the subdivision by the Planning Commission or the City Council. Subparagraph (C) of the same Section provides that approval of the Preliminary Plat by the Planning Commission shall be valid for a maximum of sixty (60) days after approval, unless upon application of the developer, the Planning Commission shall have granted an extension and if the "final" plat has not been recorded within the time required by the Ordinance, the Preliminary Plat must again be submitted to the Planning Commission for re-approval. In this case, the Preliminary Plat "conditionally" approved by the Planning Commission and referred voluntarily by the appellants to the City Council for the Council's review, was invalid at the time of the commencement of trial and at the present time, because no "final" plat was filed with the Council or recorded within the time required by the Ordinance, including the sixty day extension granted to the appellants by the Planning Commission and no "Final" Plat has, in fact, ever been filed with the Planning Commission or recorded. Further, the condition upon which the "Preliminary" Plat was approved by the Planning Commission has never been resolved. (TR., pp. 196, 198, 203, 204, 245, 255, 258; Mapleton City Code, 1971, Sections 9-6-3, 4, 5)

Section 9-6-5 (A) of the Code provides that after compliance with the provisions of the Ordinance relating to the "Preliminary" Plat, the subdividers shall submit to the Planning Commission a "Final" Plat with two black and white prints of the subdivison. Such "Final" Plat has never been submitted to the Planning Commission and a purported "Final" Plat was tendered to the City Council only after approximately 20 months had elapsed after

the conditional approval of the "Preliminary" Plat by the Planning Commission and approximately one year after the pending action was commenced. In fact, the appellants have never submitted to the City Council a "Final" Plat approved by the Planning Commission, incorporating and complying with the requirements of a "Final" Plat as set forth in Section 9-6-5 of the Code.

Although not technically required to approve or disapprove the "Preliminary" Plat, in view of the provisions of Section 9-6-4 (B) of the City Code, the City Council, at the request of and as an accommodation to the appellants, nevertheless reviewed and advised the appellants of their disapproval of the same, citing multiple reasons therefor. There was never any follow-through by the appellants by way of proper submission of a "Final" Plat for review and consideration by the Council.

Further, no action taken or omitted by the City Council, whether considered advisory or otherwise, was ever the subject of an appeal by the appellants to the Board of Adjustment of the City, which is empowered under the provisions of Section 7-4-3 of the Mapleton City Code to hear and decide appeals where it is alleged by the appellants that there is error in any order, requirement, decision, or refusal made in the enforcement of the Ordinance.

Judge Sorensen in his ruling at pre-trial as noted in the Court file Minute Entry of December 17, 1976, and Judge Sam, in his Findings and Decision of June 14, 1978, properly ruled that the appellants never did exhaust their administrative remedies prior to the commencement of suit.

The well-established doctrine of "Exhaustion of Administrative Remedies" requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the Courts will act. (2 Am. Jur. 2nd 426, Section 595.) This doctrine is well-established, is a cardinal principle of practically universal application and no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. (2 Am. Jur. 2nd 428, Section 595, citing: MACCAULEY v. WATERMAN S. S. CORP., 327 US 540, 90 LEd 839, 66 SCt 712)

The doctrine of exhaustion of administrative remedies is sometimes said to rest upon the presumption that the administrative agency, if given a complete chance to pass upon the matter, will decide correctly and is merely one aspect of the broader doctrine which requires final administrative action as a prerequisite of judicial review. (FLORENTINE v. DARIEN, 142 Conn. 415, 115 A.2d 328; THOMAS v. RAMBERG, 240 Minn. 1, 60 NW 2nd 18; CAVANAUGH v. UNDERWRITERS LIFE INSURANCE COMPANY, (Tex. Civ. App.) 231 SW 2nd 753) The doctrine has been applied in those cases where the plaintiff has altogether failed to invoke his administrative remedies, as in this case (YAKUS v. United States, 321 US 414, 88 LEd 834, 64 SCt 660; WILLIAMS v. BANKERS NATIONAL INSURANCE COMPANY, 80 Ariz. 294, 297 P 2d 344) and in those cases where the plaintiff has failed to properly apply for a license or permit or for variation of zoning restrictions imposed by a City.

POINT II

THE APPELLANTS HAVE MADE NO SHOWING THAT ACTIONS OF THE RESPONDENT WERE ARBITRARY OR CAPRICIOUS AND THE RECORD, TO THE CONTRARY, DISCLOSES THAT, IN FACT, THEY WERE NOT.

Whether actions and decisions of the City Council in disapproving the "Preliminary" Plat of the appellants after its "conditional" approval by the Planning Commission are considered "advisory" or otherwise, there is not a scintilla of evidence in the record in support of the appellants' claim that such actions or decisions were "arbitrary or capricious". Technical deficiencies in the procedures followed by the appellants in filing their "Preliminary" Plat and in failing to file any "Final" Plat, aside, the record affirmatively shows that the proposal of the appellants was thoroughly reviewed and given careful consideration by the Council over an extended period of time, and the action taken by the respondent was fully warranted and justified by the facts.

First, it should be noted that the Preliminary Plat was approved "conditionally" by the Planning Commission and that condition specifically required that the recognized water problem be resolved. The fact that the appellants made certain proposals relating to the use of water from their irrigation well, which were unacceptable to the respondent, did not constitute a resolution of the problem. The City tried strenuously to work out the problem with the appellants and appointed a Special Committee to undertake that endeavor. (Exhibits 13, 32, 36, 23; TR., pp. 32) It was recognized that a solution of the water problem was essential. (TR., pp. 72) The City Engineer, Mr. Wilson, advised the City that the culinary water distribution system could not accomo-

date the subdivision without impairing water pressure and supply to the other inhabitants of the City, (Exhibits 43, 44; TR., pp. 24) and the evidence discloses that although some six inch and some eight inch lines border the proposed subdivision, they are fed from the water sources by lines of a smaller size which, in effect, limits the quantity of water which the larger pipes can convey, to the quantity of water the smaller pipes can carry. (TR., pp. 24, 33, 34) The proposals made by the appellants, most of which were submitted after this action was commenced, did not, in the judgment of the Council, offer a viable and acceptable solution to the problem. The problem was, in fact, never resolved. (TR., pp. 100)

Second, there was an obvious conflict between the "Preliminary" Plat of the subdivision and the Master Street Plan (Exhibits 2, 18) and an amendment of that plan was imperative if the subdivions were to be approved.

Section 2-2-9 of the Mapleton City Code, 1971, provides that in order to preserve the integrity of the official map no permit shall be issued by the Building Inspector for any building or structure or part thereof on any land located between the mapped lines of any street as shown on the official Map and that any person aggrieved by his inability to obtain such a permit may appeal to the Board of Adjustment. Further, Section 2-2-11 of the Code provides:

> "Whenever the Planning Commission shall have certified a Master Plan or any part thereof to the Council, and the Council shall have adopted the plan, thenceforth all streets, parks, or other public grounds, public buildings, or structures, and public utilities, whether publicly or privately owned, shall be constructed in accordance to, and in conformity with the plan." (TR., pp. 91, 152, 187)

Considering the proposed addition of a multitude of new homes in the area and the traffic problems anticipated therefrom, the Council, in its judgment concluded that the deletion of the affected streets from the Master Plan was not in the interest of the City and its inhabitants, and therefore declined to amend the Master Plan to accomplish that objective. (TR., pp. 106, 111, 234)

Third, no percolation tests were ever provided by the appellants nor were the sewer problems in connection therewith ever resolved. While there was some testimony to the effect that the area embraced in the proposed subdivision was adaptable to septic tanks (TR., pp. 186), it was admitted by the same witness that the adequacy of soil conditions for septic tanks, could not be determined without soil percolation tests, TR., pp. 186) yet no such tests were ever made (TR., pp. 123). On the other hand, an overlay showing soils and drainage conditions of both the "Carnesecca" and "Seal" proposed subdivisons disclosed that the "Carnesecca" subdivision land was classified as "good" whereas the "Seal" land was classified as only "fair", yet the State of Utah found that the drainage in the "Carnesecca" tract was inadequate for septic tanks and refused to sanction the subdivision. (Exhibit 33; TR., pp. 208, 209, 210) On the basis of these facts, the City was fully justified in concluding that sewage disposal problems incident to the subdivision were not resolved.

Inasmuch as no "Final" Plat was ever filed with the Planning Commission or the City Council before the pending action was commenced, and inasmuch as the purported "Final" Plat filed with the City Council on June 21, 1977, long after the pending action was

begun, was clearly deficient in meeting the requirements for a "Final" Plat, including dedication of streets, percolation tests, the installation of permanent survey stakes, and the required approval of the Planning Commission and Engineer, there was no opportunity afforded the City Council to review and approve or disapprove a properly executed "Final" Plat. (Exhibit 38; TR., pp. 255, 259)

Fourth, from policy considerations alone, it was within the power of the City to control growth in given areas, if that had been the City's purpose, in order to bring about an orderly development of the City's large land area compatible with community needs and the City's ability to meet the financial burden incident to such development. In the case of CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY v. THE CITY OF PETALUMA, reported at 522 Federal 2nd 897, the City appealed from a decision of the United States District Court for the Northern District of California which had voided, as unconstitutional, certain aspects of such a developmental plan. The United States Court of Appeals for the Ninth Circuit reversed the District Court on August 13, 1975, and certiorari was denied by the United States Supreme Court on February 23, 1976. (96 S.Ct. 1148)

Although the burden was upon the appellants to establish by competent proof that the actions of the respondent were "arbitrary and capricious", there is nothing in the record to support the appellants' claim and the Court, in its decision of June 14, 1978, so found.

POINT III

THERE IS NO BASIS WHATEVER IN THE RECORD UPON WHICH THE APPELLANTS CAN ESTABLISH ANY CLAIM FOR DAMAGES AS AGAINST THE RESPONDENT.

First of all, as established by the uncontroverted Affidavit of the City Recorder filed in support of the respondent's Motion for Summary Judgment, no verified claim for damages was ever presented to or filed with the respondent by the appellants, and such filing is a condition precedent to any enforceable claim against the City for money damages. After providing for certain exceptions which are not applicable to the appellants' claim, title 10-7-77, Utah Code Annotated, 1953, as amended, provides:

> "...Every claim other than claims above mentioned, against any city or town must be presented, properly itemized or described and verified as to correctness by the claimant or his agent, to the governing body within one (1) year after the last item of such account or claim accrued. ... "

The same Section further provides that no action shall be maintained against any City or town for damages or injury to persons or property unless it appears that the claim for which the action was brought was presented as aforesaid, and that such governing body did not, within ninety (90) days thereafter, audit and allow the same.

The appellants have never made any claim that they have ever filed such a verified claim and under these conditions their claim for money damages cannot be entertained or sustained. The statutory right to recover, granted by Section 10-7-77, Utah Code Annotated, 1953, as amended, can be availed of only when there has been a compliance with the conditions upon which such right is conferred and one who seeks to enforce the right

must, by allegation and proof, bring himself within the conditions prescribed thereby. (HAMILTON v. SALT LAKE CITY, 99 Utah 362, 106 P. 2d 1028)

The appellants in this case have claimed that the action of the respondent City in connection with the Preliminary Plat filed by the appellants was wrongful. That claim is, of itself, equivalent to a claim that the action or failure to act was tortious.

In the case of DAHL v. SALT LAKE CITY, 45 Utah 544, 147 P. 622, the Court observed that it should be noticed that the claims which must be presented before an action can be brought and successfully maintained thereon are divided into two classes: one class consisting of claims "for damages or injury alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert, or bridge" which must be presented within thirty (30) days after the happening of such injury or damage, and the second class consisting of "every claim, other than the claims above mentioned", must be presented, properly itemized or described within one year after the last item of such account or claim accrued.

Title 10-7-78, Utah Code Annotated, 1953, expressly provides:

> "It shall be a sufficient bar and answer to any action or proceeding against the City or town in any Court for the collection of any claim mentioned in Section 10-7-77, that such claim had not been presented to the governing body of such City or town in the manner and within the time specified in Section 10-7-77; ..."

Implementing the foregoing Section, this Court, in HURLEY v. TOWN OF BINGHAM, 63 Utah 589, 228 P. 213, held that pre-

sentation of a claim within the time fixed by law was a condition precedent to bringing action against the town and that failure to file a claim barred any action against the town and any consideration of the claim by the town did not constitute a waiver of the filing thereof by the claimant. (See also THOMAS E. JEREMY EST. v. SALT LAKE CITY, 87 Utah 370, 49 P. 2nd 405)

It should be noted, also, that the record is totally destitute of any evidence whatever of any damage to the appellants by virtue of any acts or omissions of the respondent, and the Court, in its decision of June 14, 1978, so found. (TR., pp. 426)

Further, the decision of the City Council in matters of the kind now pending before this Court is "governmental" in nature and not proprietary and the City and its officers cannot be held accountable in damages by reason thereof.

Title 63-30-3 Utah Code Annotated, 1953, as amended, (Governmental Immunity Act) provides:

> "Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function."

There follows certain exceptions, including quiet title actions, foreclosure actions, actions for injuries from negligent operation of motor vehicles, injuries caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures, public buildings, or improvements, or injuries proximately caused by the negligent act or omission of employees of the City committed within the scope of their employment. The appellants have not brought themselves within the definition of

any of the foregoing exceptions and the general rule is, therefore, applicable.

The test in deciding whether the government is acting in a proprietary or governmental capacity is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. (DAVIS v. PROVO CITY CORP., 1 Utah 2nd 244, 265 P. 2d 415) and a City is liable in damages when it is negligent while acting in a proprietary capacity, but exempt from liabilty when it is negligent in the performance of governmental duties. The actions taken by the respondent in this case can only be characterized as "governmental" in nature.

The appellants' claim of damages by reason of the alleged unlawful taking of property without just compensation, through eminent domain is equally without merit.

In the first place, the respondent has brought no action against the appellants in the nature of an eminent domain proceeding, or otherwise, and has not sought to obtain title to appellants' property. The appellants' claim can only be characterized as an attempt to establish by the judgment of this Court, that restrictions in the use of property imposed upon a property owner through the police power of a City constitutes an unlawful taking of that property. More specifically, the appellants' claim that because property is designated on a Master Street Plan of the City for future development and implementation and certain limitations are imposed relating to construction thereon, this constitutes an unlawful taking of property. This is not the case, and no

cases are cited which support that proposition. On the contrary, Section 2-2-8 of the Mapleton City Code, 1971, expressly refutes such a claim. That Section provides that the placing of any street or street lines upon the official map shall not in and of itself, constitute or be deemed to constitute the opening or establishment of any street or the taking or acceptance of any land for street purposes. If and when the City should determine to implement the Master Street Plan, in any area, and private property is required for that purpose, it can be assumed that the owner thereof will be compenstated therefor. Until then, the property has not been taken and the mere adoption of the Master Plan does not render such action compensable.

On top of all of this, the appellants offered no evidence whatever, at trial, of any damage sustained by them as a result of respondent's actions. (TR., pp. 426)

POINT IV

THE OFFICE AND PURPOSE OF MANDAMUS IS TO COMPEL LAWFUL ACTION BUT NOT TO DICTATE OR CONTROL THE CITY'S DECISIONS.

"A public officer is in duty bound to exercise the judgment or discretion which is reposed in him by law. If he fails or refuses to do so, and does not act upon the subject or pass upon the question on which judgment or discretion is to be exercised, then the Writ of Mandamus may be used to enforce obedience to the law. In other words, when in matters involving discretion, the respondent refuses to act at all, mandamus may issue to move him to action and to exercise his discretion in the matter. (Citing SMYTH v. BUTTERS, 38 Utah 151, 112 P. 809)...

The relator in such case merely asks that the respondent make a decision one way or the other. He does not seek to use the Writ to compel or control the decision in any particular way, as will be seen, this cannot be done. (52 Am. Jur. 2d 398, Section 77)

Although, as has been seen, mandamus may be resorted to for the purpose of compelling the exercising of official discretion, the use of the Writ will not ordinarily be extended so as to interfere with the manner in which the discretion is exercised or to influence or coerce a particular determination. (Citing MCCARTEN v. SANDERSON, 11 Montana 407, 109 P. 2d 1108, 132 ALR 1229) It has been reiterated that in the absence of a capricious or arbitrary act, mandamus will not issue to control the exercise of official discretion or to alter or review action taken in the proper exercise of such discretion or judgment. (Citing SMYTH v. BUTTERS, 38 Utah 151, 112 P. 809)

Thus, mandamus will not lie to control the discretion of the Court or judicial officer, or to compel its exercise in a particular manner, except in those rare instances where under the facts, it can be legally exercised in but one way, nor is it a proper remedy to control acts of governmental bodies when acting within the scope of their legal powers. (Citing GOODMAN v. MEADE, 162 PA. Super. 587, 68A2nd 577). Mandamus is not an instrument for the instruction of public officers as to the manner in which they shall discharge duties which call for the exercise of discretion, as distinguished from the performance of ministerial duties. (Citing WOLF v. YOUNG, Texas Civil Appeals 277 SW 2nd 744)

Mandamus is used to stimulate action pursuant to some legal duty, and is not to cause the respondent to un-do action already taken, or to correct or review such action however erroneous it may have been. (Citing STATE EX REL. ROBINSON v. HUTCHESON, 180 Tennessee 46, 171 SW 2nd 282, 168 ALR 850)

Mandamus is not a subsitute for, and cannot be resorted to in civil proceedings to serve the purpose of certiorari, appeal, or writ of error, and this is true even though there is no mode of review given by or available under the law. ... (52 Am. Jur. 2nd 337, Section 9)

Where there is no other adequate remedy, mandamus will issue to enforce performance of plain and imperative duties of a ministerial character imposed by law upon administrative bodies. The writ will not issue to control judgment or discretion. Unless there has been a clear abuse of discretion, or the action of the agency was arbitrary, capricious, or prompted by wrongful motives, where judgment or discretion is reposed in an administrative agency and has, by that agency been exercised, courts are powerless to use the writ of mandamus to compel a different conclusion. (US EX REL. CHICAGO G.W.R. COMPANY v. INTERSTATE COMMERCE COMMISSION, 294 US 50)"

The foregoing principles of law prevail in the State of Utah. In the case of TUTTLE v. BOARD OF EDUCATION OF SALT LAKE CITY, 77 Utah 270, 285; 294 P 294, this Court said that mandate does not lie unless the relator or petitioner shows a clear legal right to performance of the act demanded and the plain duty of the officer, board, or tribunal to perform it, as demanded, and where the duty to perform the act is doubtful, or where a discretion is imposed or involved in the performance of it, mandate ordinarily will not compel the performance of it in a particular way. A Writ of Mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, nor to reverse its judgment when made. (HATHAWAY v. MCCONKIE, 85 Utah 21, 38 P. 2d 300)

The action of a public officer in a situation calling for the exercise of discretion is not reviewable by mandamus unless such officer has been guilty of clear and willful disregard of duty or acts with caprice or partiality. (STATE EX REL. BISHOP v. MOREHOUSE, 38 Utah 234, 112 P. 169)

In distinguishing between ministerial duties and duties involving judgment or discretion, the general rule is that in matters involving interpretation of a statute, the officer or board acts with judgment and discretion.

> "A duty or act is ministerial in the sense herein intended when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law ... But a duty is regarded as involving the character of judgment or discretion, and cannot be controlled by mandamus, where it is not thus plainly prescribed or depends upon a statute or statutes, the construction or application of which is not free from doubt. ...

Where the duty is not plainly prescribed, but is to be gathered by doubtful inference from a statute or statutes of uncertain meaning, it is to be regarded as involving the character of judgment or discretion which may not be controlled by mandamus, even though the Court may deem the conclusion reached to be erroneous. ... (52 Am. Jur. 2nd 402, Section 80, 81, and 82)"

The issuance of licenses or permits by boards and officers charged with that responsibility is a discretionary function.

"Boards and officers charged with the duty or power of issuing licenses and permits usually exercise a discretionary function in the matter. Their determination involves a judgment as to the right and fitness of the applicant and generally calls for examining evidence and passing upon questions of fact. Where such is the case, Courts may compel them to exercise their judgment or discretion, but will not attempt to control their discretion or compel them by mandamus to decide in a particular way. If in the proper exercise of their power they refuse a license or permit, the writ will not issue to reverse or review their decision. (ANNO: 20 ALR 1482; 29 ALR 41, 42; 53 ALR 149, 153; 72 ALR 1339; 124 ALR 247, 249)"

The foregoing rule which accords to officers and boards a status of judgment and discretion in the exercise of their powers in issuing permits and interpreting ordinances is adhered to by the Courts of this State.

In NAYLOR v. SALT LAKE CITY CORPORATION, 17 Utah 2nd 300, 410 P. 2d 764, the Court said:

"The (zoning) Commission being charged with the duty of carrying out these numerous and varied objectives must necessarily be allowed a wide latitude of discretion as to the manner in which they can best be attained. In conformity with well-established rules relating to the power of administrative bodies, it is to be assumed that they have some specialized knowledge of the conditions and the needs upon which the discharge of their duties depends. Because the law imposes this duty primarily upon the commission, and because of its presumed expertise in fulfiling that responsibility, the Court will not invade the province of the commission and substitute its judgment therefor; nor will it interfere with the preorogatives of the commission unless it is

shown to be so clearly in error that there is no reasonable basis whatsoever to justify it and its action must therefore be regarded as capricious and arbitrary. (See also, GAYLAND v. SALT LAKE COUNTY, 11 Utah 2nd 307, 358 P. 2d 633)"

The meaning of the terms "arbitrary and capricious" in connection with municipal zoning is succinctly set forth by the Court in JEHOVAH'S WITNESSES v. MULLEN, 214 Oregon 281; 330 P. 2d 5, as follows:

"The terms "arbitrary and capricious" action when used in connection with determining the validity of action of municipal zoning authorities means willful and unreasoning action, without consideration and in disregard of facts and circumstances of the case, and where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration even though it may be believed that an erroneous conclusion has been reached."

Further, the burden of proving its right to a Writ of Mandamus rests upon the appellants and all presumptions are in favor of the respondent. When the appellants applied for a Writ of Mandamus, the burden of proving their entitlement thereto rested upon them and all presumptions are against in them and in favor of the respondent.

"The rule that the burden of proof rests upon the party who asserts the affirmative of an issue applies in mandamus proceedings. Thus, the burden is upon the applicant to show that his right to the issuance of the writ is clear and indisputable and, except as to allegations that are admitted by the answer or otherwise, he must prove every fact that is the foundation of his proceeding. He must show an enforceable right; an imperative duty of the respondent to perform; the authority, ability and means of the respondent of performing his duty; the lack of another plain, speedy and adequate remedy; the performance or compliance with necessary conditions precedent, including, where necessary, a demand for performance and refusal thereof; and, if the duty in question is discretionary, that there was an arbitrary exercise or abuse of discretion. ... (52 Am. Jur. 2nd 786, Section 466)."

The plaintiffs in action to review the action of County

Commissioners denying an application for permit to construct and operate a mobile homes park, had the burden of establishing their cause of action by a preponderance of the evidence and it was incumbent upon them to show unreasonableness of such action. A court, in an action to review a County Commissioners' denial of permit may not substitute its judgment for that of the Commissioners, and should not declare the action of the Commissioners unreasonable unless clearly compelled to do so by the evidence in the light of the presumption that the Commissioners acted reasonably. (CRETEN v. BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, 204 Kansas 782, 466 P. 2d 263; COE v. ALBUQUERQUE, 76 New Mexico 77; 418 P. 2d 545)

It was held in the case of MUELLER v. CITY OF PHOENIX EX REL. PHOENIX BOARD OF ADJUSTMENT, 102 Arizona 575, 435 P. 2d 472, that a presumption of validity exists in favor of a Board of Adjustment determination and one who attacks such determination is met with the presumption and carries the burden of showing the decision to be against the weight of the evidence and unreasonable, erroneous, or illegal, as a matter of law.

The Courts of this State have adopted the foregoing principles. (See MORRISON v. HORNE, 12 Utah 2nd 131, 363 P. 2d 1113)

CONCLUSION

For the reasons and upon the authorities set out herein, it is respectfully submitted that the Findings and Judgment

of the Trial Court entered June 14, 1978, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 24th day of January, 1979, I mailed, postage prepaid, two copies of the foregoing Brief of Respondent to THOMAS S. TAYLOR, CHRISTENSEN, TAYLOR & MOODY, Attorneys for Appellants, 55 East Center Street, Provo, Utah 84601.

V. Pershing Nelson